91-1919

Case No. _____

FILED
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SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICHARD M. SOWERS,

Plaintiff,

vs.

FEDERAL EXPRESS CORPORATION,

Defendant.

PETITION for Writ of Certiorari
to the United States Court of Appeals
for the Ninth District

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the Federal Courts can mandate the use of an employer-dominated "quality circle" as the exclusive bargaining "representative" of a Railway Labor Act "employee" who holds his employment via an individual contract of employment even though that "employee" had properly terminated any agency relationship with this employer-dominated "representative"?

2. Is the January 31, 1992 Order from the Ninth Circuit that mandated that SOWERS (and all flight crewmembers) must use an employer-dominated "quality circle" as their exclusive bargaining agent in violation of the Railway Labor Act, Section 2 Third and Fourth (45 USC 152 Third, Fourth)?

3. Does the January 31, 1992 order from the 9th Circuit, in fact and effect, "certify" an employer-dominated "quality circle" as the exclusive "representative" of

SOWERS (and all other the flight crewmembers) in violation of the Railway Labor Act (45 USC 152, Third, Fourth and Ninth)?

LISTING OF ALL PARTIES TO THE PROCEEDING

1. Plaintiff: Richard M. Sowers
2. Defendant: Federal Express Corporation

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1. Opinion of court delivered by the Hon. Bruce R. Thompson, presiding judge, United States District Court, District of Nevada, granting Summary Judgment for Defendants; October 25, 1990.

2. Memorandum of Opinion denying appeal, before the Hons. Sneed, Schroeder and T. G. Nelson, Circuit judges for the United States Court of Appeals for the Ninth Circuit; January 30, 1992.

3. Order denying request for re-hearing and suggestion for re-hearing en banc by the Hons. Sneed, Schroeder and T. G. Nelson, Circuit judges, dated March 31, 1992.

STATEMENT OF JURISDICTION

Date of the entry of judgment sought to be reviewed: January 30, 1992. Denial of appeal by the United States Court of Appeal for the Ninth Circuit from the granting of a Summary Judgment Motion in the United States District Court for the District of Nevada.

Petition for re-hearing with suggestion for re-hearing en banc was denied by the United States Court of Appeals for the Ninth Circuit on March 31, 1992.

This Court has jurisdiction to review the judgment in question by writ of certiorari by virtue of 28 USC 1254(1), Rules of the U. S. Supreme Court, Rule No. 10.

PERTINENT STATUTORY PROVISIONS INVOLVED IN THE CASE

45 USC, Section 151 and 2.[1]

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[1] Because this statutory section is lengthy, SOWERS provides the citation in this section with the full text included in

STATEMENT OF THE CASE

1. Factual Background

SOWERS is a Federal Express pilot who holds his employment via an individual contract of employment, the material terms and conditions of which are memorialized in a document called the Flight Crewmembers' Handbook (FCH); this fact being stipulated to by both parties. This individual contract (the FCH) contained provisions for modification via a revision process (see Appendix, Excerpt from Pre-Trial Order) wherein SOWERS was to be represented by a revocable agent, an employer-dominated organization called the Flight Advisory Board (FAB), an organization that was the child of Federal Express management and whose $1.1 million budget is paid completely by Federal Express and which was comprised of Federal Express pilots.

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the Appendix, Tab D.

Succinctly put, all revisions to the FCH, SOWERS' individual contract of employment, were to be made by SOWERS' revocable agent, the FAB, in a written FCH process (Appendix) wherein the FAB would consult/advise with Federal Express management concerning the particular revision.

In July, 1989, SOWERS properly terminated his revocable agency with the employer-dominated FAB with proper notice to both the FAB and to Federal Express; this also being a stipulated fact between the parties.

The particular revision or modification to the FCH that SOWERS objected to the FAB acting in his stead essentially provided that, in the event of a Federal Express merger with another airline employing pilots, said other airline pilots would be "tail-ended" in seniority behind present Federal Express pilots. Federal Express

management suggested that the FCH be revised so that the pilots acquired from Flying Tiger during the merger process would be "dove-tailed" rather than "tail-ended" in seniority positions. The net result of this "dove-tailing" was that SOWERS would lose approximately 600 seniority positions if his individual contract of employment was modified.

SOWERS' purpose in firing the FAB was to preserve his pre-existing individual contractual rights (his pilot seniority position).

Particularly offensive to SOWERS (and all other flight crewmembers) was the fact that the pre-existing individual contractual right in question, whereby he was assured of seniority "tail-ending", had previously been the result of a bargained-for exchange wherein Federal Express was allowed to operate aircraft up to fifty thousand pounds with non-Federal Express crewmembers in

exchange for seniority "tail-ending" assurance, if the company, in the future, should ever merge with another airline.

Subsequent to, and in accordance with this 1988 bargained-for exchange Federal did, in fact, operate aircraft up to fifty thousand pounds and did reap the benefit via this partial performance of the contract. On December 16, 1988, Federal and Tiger International entered into an agreement and plan of merger. As part of that agreement, Federal voluntarily assumed the Federal Express-Flying Tiger Labor Protective Provisions (LPP's) (Appendix) Section 3, which agreed, in direct contradiction to the already-existing (and partially performed) individual contract of employment of SOWERS, to "dove-tail", or integrate, the seniority lists of the flight crewmembers.

After terminating his agency with the employer-dominated FAB, SOWERS sued for (among other things) anticipatory breach of

contract in the United States District Court, District of Nevada, to preserve his pre-existing contractual rights.

Pursuant to a Motion for Summary Judgment by Federal Express, the District Court granted said motion and entered an order of judgment thereupon on November 5, 1990 (see Appendix).

SOWERS appealed this judgment on November 27, 1990, to the United States Court of Appeals for the Ninth Circuit, which heard arguments on January 13, 1992 and ruled on January 30, 1992 (see Appendix), ruling (which ruling singularly prompted this Writ) that "the FCH was at all times amendable, according to its terms, with or without SOWERS' individual consent", and when "SOWERS notified the FAB that he had 'terminated his agency with them' SOWERS removed himself from the amendment process; this did not affect the process or the resulting modification. The FAB-approved

revision committee can bind SOWERS to FCH revisions"; thus creating the specific issue that is the subject of this Petition for Writ of Certiorari. Can the Federal Courts do indirectly that which the NMB can only do after scrupulous adherence to its rules that, among others, require a majority vote prior to an organization becoming an exclusive bargaining agent?

2. Basis for federal jurisdiction in the Court of First Instance.

The Federal District Court, District of Nevada, had diversity jurisdiction under 28 USC 1332(a), in that Federal Express Corporation is a citizen of a state other than the state of citizenship of SOWERS and the amount in controversy exceeds one million dollars, excluding interest and costs; and under 28 USC 2201 for declaratory relief.

Venue is proper in the Nevada District Court because of the provisions of 28 USC

1391(a) in that SOWERS, the sole Plaintiff, was (is) a resident within the jurisdictional limits of the United States District Court, District of Nevada.

The basis for claiming that the judgment appealed from is final is Federal Rule of Civil Procedure, Rule 56; 28 USC 1291.

ARGUMENT

1. SOWERS requests that the United States be allowed to express its views concerning the issues presented for appeal in this matter, i.e., a court-mandated, exclusive bargaining agent for an RLA "employee". SOWERS requests that the solicitor general be offered the opportunity to present the position of the United States in this most important, fast-emerging and unsettled area of law.

2. The Ninth Circuit Court of Appeal, in its ruling, by holding that SOWERS could not "fire" the employer-dominated FAB as his agent and that revisions to SOWERS' admittedly individual contract of employment could only be made by the employer-dominated FAB with or without SOWERS' consent essentially accomplished without the election or certification process required by the Railway Labor Act, Section 2, Third, Fourth and Ninth (45 USC Section 152, Third,

Fourth and Ninth) which state in pertinent part:

> Fourth:
>
> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this act....and it shall be unlawful for any carrier... to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining...

and Ninth:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the

> requirements of this act, ...the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this act.

SOWERS contends, in this case of first impression, that it is solely and exclusively within the jurisdiction of the Railway Labor Act and the National Mediation Board to determine who, if anyone, should have the power to be his exclusive, collective bargaining agent; not the Federal courts via a two-page Order.

The heart of the issues lies in paragraphs Third, Fourth and Ninth of Section Two (45 USC Section 152) which, like the rest of the Railway Labor Act, are administered by the National Mediation Board. Paragraph Ninth sets forth the exclusive jurisdiction of the Board to certify the name or names of individuals or

organizations who are the authorized and designated bargaining representatives.

Indeed, once the Board has made the determination of an employee's choice of representative, if any, it then issues a written certification declaring that person or organization as the designated and authorized representative. The Act, in Section 2 Ninth, further states: "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." (Underlineation added for emphasis.) Here, the Ninth Circuit has forced SOWERS (and all other flight crewmembers) to "treat" with the employer-dominated FAB.

The Supreme Court sanctioned this authority in a 1937 decision.[2] The Federal courts defer to the National

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[2] Virginia Ry v. System Federation No. 40 300 U.S. 515 (1937).

Mediation Board in the exercise of its administrative authority more than to most administrative agencies. This fact is fundamental to an understanding of representation matters under the Railway Labor Act. One of the early leading cases in administrative law established the principle that Congress and the Railway Labor Act has left to the discretionary authority of the National Mediation Board the determination of eligible voters, the determination of craft or class bargaining units and the certification of representatives.[3]

A plethora of decisions by the Supreme Court and lower Federal Courts since Switchmen's Union has adhered consistently to the view that the Board has non-reviewable discretion in the performance of its duties in representational disputes,

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[3] Switchmen's Union v. National Mediation Board 320 U.S. 297 (1943).

even if Board action is allegedly arbitrary or denies due process.[4] It is still a truism that decisions and determinations of the National Mediation Board in resolving representation disputes under Section 2 Fourth and Ninth are discretionary and essentially non-reviewable by the Courts.

The bottom line is that the anomalous sum total of the Switchmen's Union cases and their progeny may be stated as follows: the National Mediation Board has a limited role in representation matters under the act but its discretion is virtually unlimited in the performance of that role.

Unlike the National Mediation Board, the Federal Court system (here, the Ninth Circuit) jurisdictionally and administratively is precluded from

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[4] Board of Rwy & SS Clerks v. United Transport Service Employees of America 137 F.2d. 817 (DC Cir., 1943 rev'd. per curiam 320 U.S. 715 1943; Decker v. Linea Aeropostal Venezolana 258 F.2d. 153 (DC Cir., 1958; Ruby v. American Airlines, Inc. 323 F.2d. 248 (2d.Cir., 1963).

accomplishing the requisite investigation to determine to either establish a crafts or class and/or determine the designation and recognition of representatives for collective bargaining purposes. Nor did the Ninth Circuit, in this case, even attempt such a process; rather, the Ninth Circuit, by its January 30, 1992 two-page Order, without cite to authority, both stripped SOWERS of his long-established and fundamental contractual right to terminate a revocable agent but, more importantly, it exceeded its jurisdiction by essentially annointing this employer-dominated "quality circle" (the FAB) with all of the rights of an exclusive collective bargaining unit under the Railway Labor Act but without any of the safeguards and responsibilities.

The crux of this request for certiorari is that all Federal Express pilots, who hold their employment via an individual contract, are now forced into using an employer-

dominated "quality circle" (the FAB) as their representative; this "representative" neither being a "representative of [their] own choosing" (see 45 USC 152 Fourth) nor being determined by a "majority of the craft or class" (45 USC 152 Fourth).

Such a travesty, in effect, sounds the death knell for legitimate organized unions, not only for purposes of the Railway Labor Act (railroads and airlines), but also for all other "employees" who fall under the auspices of the National Labor Relations Act (29 USC 151, et seq.). An employer now, thanks to the Ninth Circuit Court of Appeals' Order of January 30, 1992, may mandate the use of an exclusive bargaining agent and have their mandate enforced by the Federal Court.

Federal Express has admitted that the FAB is in effect an organization that represents the interests of its pilots and the FCH itself details how this

representations process is implemented to change "the rates of pay, rules or working conditions of its employees as a class...." (29 CFR 1204.2) (see Appendix).

SOWERS contends, with vigor, that now Federal Express (because of the Ninth Circuit Order in question) is clearly in violation of the Railway Labor Act (45 USC 151 and/or 152, Fourth and Ninth) and the appropriate implementing provisions of 29 CFR 1204.2, (see supra) and 1204.3, which states in pertinent part: "....Section 5, third, (e) of the Railway Labor Act requires all carriers to file with the National Mediation Board copies of all contracts in effect with organizations representing their employees covering rates of pay, rules and working conditions." SOWERS' individual contract of employment is not on file with the National Mediation Board, as required by this implementing Code of Federal Regulations rule.

Similarly, the Ninth Circuit has turned a blind eye to the requirements of 29 CFR, Section 1205.2, which states, in pertinent part: "The provisions of the Third, Fourth and Fifth paragraphs of Section 2 are by law made a part of the contract of employment between the carrier and each employee and shall be binding upon the parties regardless of any other express or implied agreement between them."

The January 30, 1992 Ninth Circuit Court of Appeal Order has the ultimate effect of requiring SOWERS, an individual contract holder (like all other pilots at Federal Express) to mandatorially use the employer-dominated "quality circle" (the FAB) as his exclusive bargaining agent, without any of the protections available under the Railway Labor Act. SOWERS is prevented by the Ninth Circuit Order from (on the one hand) availing himself of the long-standing fundamental principle of

contract law to terminate this agent[5], the employer-dominated "quality circle" and also (on the other) prevented from availing himself of the protections of the Railway Labor Act, to include... 29 CFR 1202.3, which states, in pertinent part:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirement of the Railway Labor Act, it is the duty of the Board upon request of either party to the dispute to investigate the dispute and certify to both

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[5] It was the Ninth Circuit's January, 1992 order that transmogrified this case from a simple contract action into a statutory quagmire from which SOWERS may not be able to escape; i.e., SOWERS now cannot "fire" his agent, the employer-dominated FAB and cannot (because of jurisdictional problems) present his plight to the NMB. He has nowhere to go but to this Court of last resort.

parties in writing, the name or names of individuals or organizations that have been designated and authorized to represent the employees involved in the dispute and to certify the same to the carrier.

CONCLUSION

Without assistance from this Court, employees are at the mercy of unscrupulous employers who wish to do indirectly that which the Railway Labor Act, and, for that matter, the National Labor Relation Act, prevents them from doing directly; i.e., control who shall be labor's representatives in collective bargaining. The national significance and importance of this quesiton is just currently coming into focus. Both the National Labor Relations Board[6] and the

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[6] Electromation, Inc. & Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 1049 & "Action Committees" a party of interest, Electromation, Inc. Employer, and,

National Mediation Board[7] have presently pending before them this very issue, with the only difference being that SOWERS could never have his case heard by the NMB because the Ninth Circuit, by its Order, essentially and unilaterally appointed the employer-dominated FAB as SOWERS' exclusive bargaining agent, without bothering with the formalities required by the RLA. In fact in Electromation, Administrative Law Judge George F. McInerny has made findings of fact and conclusions of law that would indicate a "quality circle" or "action committee" (such as the FAB) are inimical to the ability of labor to organize. The National Mediation Board has yet to rule on the

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Local 1049, Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO Petitioner Cases No. 25-CA-19818 and 25-RC-8676.

[7] Evergreen Int'l Airlines, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Airline Div'n. (IBT) NMB Case Nos. R-6094 and R-6095.

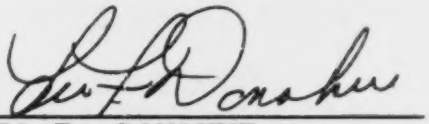
Evergreen case and SOWERS respectfully requests this Court to allow the position of the United States to be made available to this Court to assist in resolving the instant issue.

Where does SOWERS (and all other Federal Express pilots) go for relief, if denied by this Court? In this case of first impression, this Court hopefully can realize and will realize that SOWERS is without a remedy.

Either restore his traditional, contractual right to fire the FAB, his revocable agent, or prevent the Ninth Circuit from doing indirectly that which the NMB cannot do directly without following the proscriptions of the RLA.

DATED: 4/29/92

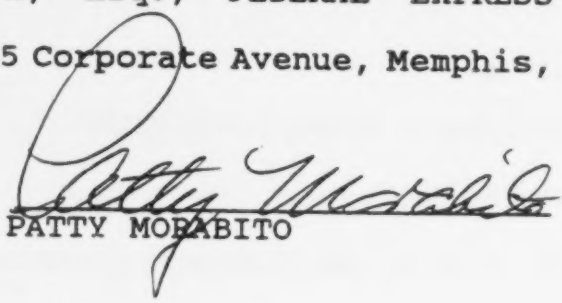
Respectfully submitted,



LEO F. DONAHUE
Attorney for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 1992, a true and correct copy of the foregoing Petition for Writ of Certiorari was deposited in the United States mail, postage prepaid, addressed to the following: Julien G. Sourwine, Esq., MORTIMER, SOURWINE, et al., P. O. Box 460, Reno, NV 89504-0460; E. Scott Smith, Esq., FORD & HARRISON, 600 Peachtree Bldg., 1275 Peachtree Street, NE, Atlanta, GA 30309; R. Larry Brown, Esq., Clifford Johnson, Esq., FEDERAL EXPRESS CORPORATION, 2005 Corporate Avenue, Memphis, TN 38123.



PATTY MORABITO

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD SOWERS, No. 90-16752

Appellant, D.C. No. CV-89-00474-BRT

v. MEMORANDUM[1]

FED.EXP.CORP.,

Appellee./

Appeal from the United States District Court for the District of Nevada, Bruce R. Thompson, Senior District Judge, Presiding

Argued and Submitted January 13, 1992, San Francisco, California

Before: SNEED, SCHROEDER, T.G. NELSON, Circuit Judges.

Richard Sowers appeals 1the district court's grant of summary judgment in favor of Federal Express Corporation ("Federal"). We review de novo, Kruso v. International

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Tel. & Tel. Corp., 872 F.2d. 1416, 1421 (9th Cir. 1989), cert. denied, 110 S. Ct. 3217 (1990) and affirm.

We may affirm on any ground finding support in the record. Id. Sowers' employment contract was not breached by repudiation or otherwise. The FCH was at all times amendable, according to its terms, with or without Sowers' individual consent. The revision process concluded on August 4, 1989, in a FAB-approved revision which complied with the FCH revision process. The district court correctly concluded that Federal properly revised Section 1-96 of the FCH before performance was due, and that Sowers' anticipatory breach theory was no more than a fiction.

Furthermore, as the district court explained, Sowers failed to treat the alleged repudiation as a breach by resigning his employment or otherwise putting Federal on notice that he considered his employment

contract to be terminated. The filing of lawsuits by Sowers did nothing to affect his employment contract. We reject Sowers' argument that by continuing this employment with Federal he was merely mitigating his damages. Sowers' arguments are an ad hoc explanation of a series of events which in reality do not support his position.

Sowers would have us believe that because he "fired" the FAB, the modification of the FCH can only be modified pursuant to action of the FAB and Federal management. Sowers notified FAB that he had "terminated his agency with them" Sowers removed himself from the amendment process; this did not affect the process or the resulting modification. The FAB-approved revision committee can bind Sowers to FCH revisions.

We have considered the other contentions of the parties and conclude that no additional discussion is necessary. The

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district court's entry of summary judgment is AFFIRMED.

United States District Court

District of Nevada

Reno, Nevada

RICHARD SOWERS — Docket No.

Plaintiff — CV-N-89-474-BRT

vs.

FEDERAL EXP. CORP. — Reno, Nevada

Defendant/ — October 25, 1990

PORTION OF HEARING ON MOTION FOR SUMMARY JUDGMENT OPINION OF COURT

THE HON. BRUCE R. THOMPSON, PRESIDING

UNITED STATES DISTRICT COURT JUDGE

PROCEEDINGS IN PROGRESS:

THE COURT: It's the order of the Court that summary judgment is granted in favor of Federal Express, the defendant. There isn't any question that Mr. Sowers had a right to file a lawsuit. But he has entered into an employment contract in 1984, which was still in effect, and the mere filing of that lawsuit was not a breach of any contract.

Mr. Sowers' admitted contract -- conduct was in continuance of a performance of the contract that he had entered into in 1984, and not in recognition of any breach of that contract, or termination of it, on anybody's possible theory of termination. The only contract of employment that he had was the one that he entered into in 1984, and that's the contract that he's rendering services under at the present time.

That contract admittedly contained provisions for its amendment, and procedures for its amendment, which admittedly were appropriately followed by all parties in accomplishing the amendment which permitted the merger of Federal Express and Flying Tiger on terms different from those that would have been in effect if Section 196 had not been properly modified.

Inasmuch as Mr. Sowers' employment contract was never terminated, and his assertion that by filing a lawsuit for an

anticipatory breach he had terminated the contract, is fiction, there is no basis for the plaintiff to complain of any breach of contract by the defendant, and that is kwhy summary judgment must be granted.

Do you want to prepare an order, sir? Or maybe you put one in the file, I don't know.

MR. SOURWINE: We put one in the file. There is a proposed order in the file, Your Honor.

THE COURT: Would that be with your original motion? Or...

MR. SOURWINE: I believe so, Your Honor.

THE COURT: What number is it?

THE CLERK: Number 39.

THE COURT: I think you might want to prepare a different one.

MR. SOURWINE: Very well, Your Honor.

THE COURT: You can do that within five days.

MR. SMITH: Yes, Your Honor.

THE COURT: Anything else you want to take up now? We'll be in recess until 2:00 o'clock.

PROCEEDINGS CONCLUDE AT 11:34 AM

(Court is Adjourned)

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD SOWERS, No. 90-16752

Appellant, D.C. No. CV-89-00474-BRT

v. ORDER

FED.EXP.CORP.,

Appellee./

Before: SNEED, SCHROEDER, T.G. NELSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. FRAP 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Section 151. Definitions; short title

When used in this Act and for the purposes of this Act-

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": Provided, however, That the term "carrier" shall not include any street, interurban, or suburban

electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal or a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this Act.

Third. The term "Mediation Board" means the National Mediation Board created by this Act.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or

subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is hereby conferred upon it to enter orders amending or interpreting such existing orders: Provided, however, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other

than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the Supreme Court of the District of Columbia [United States District Court for the District of Columbia]; and the term "circuit court of appeals [court of appeals]" includes the Court of Appeals of the District of Columbia [United States Court of Appeals for the District of Columbia].

This Act may be cited as the "Railway Labor Act."

Section 152. General Duties

First duty of carriers and employees to settle disputes. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and

by the employees thereof interested in the dispute.

Third. Designation of representatives. Representatives, for the purposes of this Act shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or

maintaining organization by carrier forbidden; deduction of dues from wages forbidden. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agent, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to

join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Ninth. Disputes as to identy of representatives; designation by Mediation Board; secret elections. If any dispute shall arise among a carrier's employees as to who are the representatives of such

employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized

representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to made copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

(Excerpt from Pre-Trial Order)

15. The FCH contains a Revision Process, which is administered by a Revision Committee consisting of three (3) pilots appointed by the FAB, three (3) management members appointed by the System Chief Pilot, and the System Chief Pilot. Two basic methods are specified in the FCH by which a modification to the terms of the FCH can be effectuated. Under the formal Revision Process, the Revision Committee meets to consider changes that have been proposed. A quorum of five of the six crewmembers, plus the Chief Pilot, is required to conduct the revision process. All crewmembers are thereafter notified of the proposed changes and have three (3) weeks to submit comments to the Revision Committee. After receiving those comments, the Revision Committee determines whether to recommend the changes to the FCH, and any recommended revisions

are sent to the Senior Vice President of Air Operations who decides wheth to accept the recommended revision. Any member of the Revision Committee can appeal the decision of the Senior Vice President of Air Operations to the Chief Operating Officer who, along with the Chairman and Chief Executive Officer, will render the final opinion regarding the proposed revision.

16. The other means for revising the FCH is the Bulletin Process. A Notice of Exception Bulletin is used to permit exceptions to the normal FCH procedures to be lmade for single instances where appropriate. At least six (6) of the seven (7) Revision Committee members must endorse the proposed exception in order for it to be sent to the Senior Vice President of Air Operations for approval. The determination of the Senior Vice President of Air Operations to accept or reject the exception can be appealed by any member of the

Revision Committee to the Chief Operating Officer who, acting in conjunction with the Chairman and Chief Executive Officer, will render the final opinion regarding the proposed exception.